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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/616,412	07/08/2003	Alan R. Atemboski	243148001US3	9294
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PERKINS COIE LLP			PRICE, CARL D	
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SEATTLE, WA 98111-1247			3749	

DATE MAILED: 07/07/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No.	Applicant(s)
	10/616,412	ATEMBOSKI ET AL.
	Examiner	Art Unit
	CARL D. PRICE	3749

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 25 January 2005.
- 2a) This action is FINAL. 2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) Claim(s) 46-146 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) Claim(s) _____ is/are allowed.
- 6) Claim(s) 46-146 is/are rejected.
- 7) Claim(s) _____ is/are objected to.
- 8) Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
 - a) All
 - b) Some *
 - c) None of:
 1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date 25 January 2005.
- 4) Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____.
- 5) Notice of Informal Patent Application (PTO-152)
- 6) Other: _____.

DETAILED ACTION

Response to Arguments

Applicant's arguments with respect to claims **46-146** have been considered but are moot in view of the new ground(s) of rejection.

Terminal Disclaimer

Applicant's remark indicating submission of a Terminal Disclaimer, in the response filed on **01/25/2005**, is noted. However, no Terminal Disclaimer appears in the file. The previous rejection of the claims 46-86 under obvious-type double patenting has therefore not been overcome.

Applicant's remark indicating submission of a Terminal Disclaimer, in the response filed on **01/25/2005**, is noted. However, no Terminal Disclaimer appears in the file. A rejection of the claims 46-86 and newly presented claims 87-146 under obvious-type double patenting is stated herein below.

Information Disclosure Statement

While the U.S. Patent documents, Foreign Paten Documents and Non-Patent literature listed on the information disclosure statement filed **01/25/2005** have been considered by the examiner, applicant is requested to provide an explanation of the relevance of the content of each of the Non-Patent literature documents as well as the manner in which the content of those documents may be pertinent to issues of patentability for the invention described in the claims of the present application.

Double Patenting

Claims **46-146** are rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims **1-30** of U.S. Patent No. **6,602,068**. Although

Art Unit: 3749

the conflicting claims are not identical, they are not patentably distinct from each other because the claims of the present application differ from that U.S. Pat. 6,602,068 primarily on the basis of an obvious variation in scope. Claims 46-86 of the present application are of broader scope than the claims of U.S. Pat. No. - 6,602,068. Thus, claims 46-86 if patented would there be anticipated by claims 1-30 of U.S. Pat. No. - 6,602,068.

Previous Indicated Allowability Withdrawn

The indicated allowability of claims **64-69, 72, 79 and 82** is withdrawn in view of the newly discovered reference(s) to **GB002334328 (SHIMEK et al)**, **GB002068106 (ROSIEK et al)**, **GB002035545 (PALAU)**, **US004726351 (WHITTAKER et al)** and **US005046944 (SMITH)**. Rejections based on the newly cited reference(s) follow.

Objection to Specification

The specification is objected to as failing to provide proper antecedent basis for the claimed subject matter. See 37 CFR 1.75(d)(1) and MPEP § 608.01(o). Correction of the following is required:

- Proper antecedent basis for the claim term “**recessed**” (e.g. – claim 46) must be provided.
- Proper antecedent basis for the claim term “**spacer**” (e.g. – claim 55) must be provided.

Applicant is advised to carefully review all of the claims for additional claimed subject matter lacking proper antecedent basis in the specification.

Applicant is cautioned not to add new matter to the specification.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

With regard to all following rejections based on prior art, the recitations such as "*being connectable to a base with a gas inlet aperture therein*" (e.g. - claims 46 and 87) has not been given patentable weight because the recitation occurs in the preamble. A preamble is generally not accorded any patentable weight where it merely recites the purpose of a process or the intended use of a structure, and where the body of the claim does not depend on the preamble for completeness but, instead, the process steps or structural limitations are able to stand alone. See *In re Hirao*, 535 F.2d 67, 190 USPQ 15 (CCPA 1976) and *Kropa v. Robie*, 187 F.2d 150, 152, 88 USPQ 478, 481 (CCPA 1951).

Also, in regard to the following rejections based on prior art, recitations such as "*sealably coupable*" (e.g. - claim 1, line 5), are deemed recitations of the intended use of the claimed invention which do not result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 370 F.2d 576, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 312 F.2d 937, 939, 136 USPQ 458, 459 (CCPA 1963).

Claims 46-51, 55, 56, 58, 59, 61-75, 79-92, 94-96, 98-104, 106-125, 128-135, 139-146,:

Rejected under 35 U.S.C. 103

Claims 46-51, 55, 56, 58, 59, 61-75, 79-92, 94-96, 98-104, 106-125, 128-135, 139-146, are rejected under 35 U.S.C. 103(a) as being unpatentable over **GB002334328 (SHIMEK et al)** in view of **GB002068106 (ROSIEK et al)** and **GB002035545 (PALAU)**.

GB002334328 (SHIMEK et al) show (Figures 1, 2, 4, 5, 9) and discloses (see page 8, line 21 - page 9, line 13) a burner assembly for burning a fuel gas from a gas source (17) including:

- a base (11, 11A) with a gas inlet aperture (14);
- a burner body including:
 - an non-metallic ceramic burner body upper portion (12; i.e. -“ceramic fiber top”);
 - a non-metallic ceramic burner body lower portion (13; Figure 9) of the burner body sealably coupled (i.e. - “a bead of adhesive is applied around the manifold area close to the outside perimeter of the top unit”) to the base and having an “H-shaped” gas manifold area (at 13; Figure 9) with first (not referenced; e.g. – any one portion of the H-shaped manifold area) and second (not referenced; e.g. – any one portion of the H-shaped manifold area) recessed (see page 9, lines 3-6; i.e. – “It will be understood that the H-shaped area is recessed into the ceramic fiber top 12 and provides the aforementioned and described hollow manifold 13”) gas distribution chamber portions formed therein;
 - a spacer contacting and therefore adjacent to the base (not referenced; i.e. – the downward extending perimeter portion adhesively bonded (25) to the base (11, 11A) and forming the sealed recessed gas manifold area (13));
 - a gasket forming silicon adhesive (25) positioned between the burner body (12) and base (11, 11A);
 - the upper portion of the burner body having a contoured surface (i.e. – “The novel gas burner unit is provided with a three dimensional contoured surface in the

Art Unit: 3749

ceramic fiber top and a pattern of burner jets extending through the ceramic fiber top into the gas manifold for creating a desired gas flame pattern”; see page 3, lines 7-11) with a plurality of integral peaks and valleys(see Figures 1, 2, 4, 5, 9), the contoured surface being;

- as distribution apertures (24) extending from the lower portion to the contoured surface wherein the ;
- a first set of the gas distribution apertures extending through the burner body to the first recessed gas distribution chamber portion (i.e. – that portion of the ceramic matrix communicating with a respective one of the recessed portions of the H-shaped manifold recess);
- a second set of distribution apertures extending through the burner body to the second recessed gas distribution chamber portion(i.e. – that portion of the ceramic matrix communicating with a respective other one of the recessed portions of the H-shaped manifold recess);
- a smaller intermediate chamber portion (not referenced; i.e. – the smaller chamber portion bridging the adjacent parallel and relatively longer chamber portions of the “H-shaped” manifold (13; figure 9).
- wherein the gas distribution apertures are positioned to direct a flow of the fuel gas to the contoured upper surface for ignition; and
- a simulated log (see claim 14) supported adjacent to the simulated ember bed.

GB002334328 (SHIMEK et al) discloses the invention substantially as set forth in the claims with possible exception to:

- the contoured surface shaped to simulate a plurality of coal/ember members arranged in a simulated ember bed.

GB002068106 (ROSIEK ET AL) teaches, from the same solid fuel effect gas fire field of endeavor as **GB002334328 (SHIMEK et al)**, providing a non-metallic ceramic burner body

Art Unit: 3749

with gas distribution apertures (3) extending from a flat lower portion or undersurface to a contoured upper portion or surface (4', 4'') of a plate-like member; wherein the contoured surface is shaped to simulate a plurality of coal/ember members arranged in a simulated ember bed and defines a plurality of integral peaks (6) and valleys (7). **GB002068106 (ROSIEK ET AL)** discloses the spacing of peaks (6) and troughs (7) are arranged to "ensure the hot fuel bed simulation" (see page 3, line 2), and an appearance of burning fuel is produced by "hot wispy flames around the coal and/or log elements (4, 4') to thus enhance the realism of the fire" (see page 3, lines 13-14). In this regard, it is noted that the phrase "realism of the fire" would necessarily be understood by a person having ordinary skill in the art of solid fuel effect, or simulated, gas fires to be glowing at selected color variations since it is well known that color variations are necessarily displayed in real solid fuel fires. **GB002068106 (ROSIEK ET AL)** also discloses (page 3, lines 27-34) that the log and/or coal elements 4, 4' are coated with solid organic material or impregnated or made with materials to produce selected color variations obtained from real fuel fires. **GB002068106 (ROSIEK ET AL)** shows gas aperture outlets at a plurality of different planes and different spacing (see figure 4).

GB002035545 (PALAU) teaches, from the same solid fuel effect gas fire field of endeavor as **GB002334328 (SHIMEK et al)**, providing a burner body with gas distribution apertures (3) extending from a flat lower portion or undersurface to a contoured upper portion or top surface (12) wherein the contoured surface is shaped to simulate a plurality of coal/ember members arranged in a simulated ember bed. **GB002035545 (PALAU)** acknowledges (see page 1, lines 77-98) that the result of the contoured surface is to produce "shades of varying brightness as a result of the temperature difference" wherein the colors vary "from bright red at the periphery of protuberances 12 to near-black in the most central region of the protuberance, resulting in the optical effects similar to burning logs.

In regard to claims 46-51, 55, 56, 58, 59, 61-75, 79-92, 94-96, 98-104, 106-125, 128-135, 139-146, to bring about shades of varying brightness as a result of the temperature difference in the burner for the purpose of producing the simulated realistic effect of a hot real fuel bed, it would have been obvious to a person having ordinary skill in the art at the time of applicant's

Art Unit: 3749

invention to construct the non-metallic ceramic burner body upper portion of **GB002334328** (**SHIMEK et al**) to include a flat lower portion or bottom surface, distribution apertures positioned in a plurality of planes and spacing, a peak and trough contoured profile, and/or materials that glow at selected color variations, in view of the teachings of **GB002068106** (**ROSIEK ET AL**) and **GB002035545** (**PALAU**).

Claims 53, 54, 60, 78, 93, 97, 126, 127, 136-138: Rejected under 35 U.S.C. 103

Claims **53, 54, 60, 78, 93, 126, 127** and **136-138**, are rejected under 35 U.S.C. 103(a) as being unpatentable over **GB002334328** (**SHIMEK et al**) in view of **GB002068106** (**ROSIEK et al**) and **GB002035545** (**PALAU**), as applied to claims **50, 55, 73, 87, 94** and **135** respectively above, and further in view of **US005941237** (**SHIMEK et al**) or **US004726351** (**WHITTAKER et al**).

GB002334328 (**SHIMEK et al**) show and discloses the invention substantially as set forth in the claims with possible exception to:

- the solid fuel effect gas fire burner bodies with combustion air holes extending there through and out of fluid communication with a fuel gas distribution chamber for providing an additional non-fuel mixed air supply to the flame area in order to aid in the formation of flickering or realistic looking flames.

Each of **US005941237** (**SHIMEK et al**) and **US004726351** (**WHITTAKER et al**) teach, from the same solid fuel effect gas fire field of endeavor as **GB002334328** (**SHIMEK et al**), providing solid fuel effect gas fire burner bodies with combustion air holes extending there through and out of fluid communication with a fuel gas distribution chamber. In particular:

US005941237 (**SHIMEK et al**) (see figure 17) provides a non-metallic ceramic burner solid fuel effect gas fire burner body (14), including apertures (63) and recessed portion (62),

Art Unit: 3749

with combustion air holes (65) extending there through and out of fluid communication with a fuel gas distribution chamber.

US004726351 (WHITTAKER et al) provides (see figure 4) solid fuel effect gas fire burner body, including unevenly spaced, sized and distributed apertures (37C, 37D) and recessed portions (36, 37), with combustion air holes (38) extending there through and out of fluid communication with spaced (36, 37) and intermediate (note that gas manifold (37) has restrict, or smaller, passages formed adjacent to air holes (38)) communicating a fuel gas distribution portions.

In regard to claims **53, 54, 60, 78, 93, 97, 126, 127 and 136-138**, for the purpose of providing additional non-fuel mixed air supply to the flame area in order to aid in the formation of flickering or realistic looking flames, it would have been obvious to a person having ordinary skill in the art at the time of the claimed invention to modify the burner body of **GB002334328 (SHIMEK et al)** to include air holes arranged in the manner set forth in applicant's claims, in view of the teaching of **US005941237 (SHIMEK et al)** or **US004726351 (WHITTAKER et al)**.

Claims 57, 76, 77, 105: Rejected under 35 U.S.C. 103

Claims **57, 76, 77 and 105**, are rejected under 35 U.S.C. 103(a) as being unpatentable over **GB002334328 (SHIMEK et al)** in view of **GB002068106 (ROSIEK et al)** and **GB002035545 (PALAU)**, as applied to claims **55, 73 and 99** respectively above, and further in view of **US005046944 (SMITH)**.

GB002334328 (SHIMEK et al) show and discloses the invention substantially as set forth in the claims with possible exception to:

- forming a plurality of intercommunicating chamber portions by support fence or spacers sealed with a gasket in a groove in a lower face of a non-metallic ceramic burner body flat lower portion.

Art Unit: 3749

US005046944 (SMITH) teaches, from the same solid fuel effect gas fire field of endeavor as **GB002334328 (SHIMEK et al)**, forming a plurality of intercommunicating chamber portions (728), which may be independently feed by separate gas supplies (see figures 32 and 33), by support fence or spacers (734; see Figures 28-29) sealed with a gasket forming adhesive (736) in a groove (732) cut or moulded in a lower face of a non-metallic ceramic burner body flat lower portion (730).

In regard to claims 57, 76, 77 and 105, for the purpose of controlling and distributing a fuel gas to desired portions of the burner body and for supporting and maintaining a space between the burner body and burner pan, it would have been obvious to a person having ordinary skill in the art at the time of the invention to modify **GB002334328 (SHIMEK et al)** to include a plurality of intercommunicating chamber portions, which may be independently feed by separate gas supplies, defined by support fences or spacers sealed with a gasket forming adhesive material in a groove formed in the lower face thereof and in the manner set forth in applicant's claims, in view of the teaching of **US005046944 (SMITH)**.

Conclusion

See the attached USPTO form 892 for prior art made of record and not relied upon which is considered pertinent to applicant's disclosure.

See for example:

JP63-140211 which shows a log effect fire and ember portion (7). See also, **DT '258, GB '951, GB '440, DE '019 and EP '521** for simulated solid fuel effect non-metallic burner bodies.

US002414873 (HERBST) shows a fence and restricting orifice (36) for controlling the flow of fuel gas to a separate recessed manifold portion and flame apertures (40, 24) and manifold portion flame apertures (42, 26).

US004149516 (HALL) shows an ceramic H-shaped burner manifold chamber (50) formed by recessed areas on the lower surface of an upper portion (50; figure 4) where a spacer (44, 48, 56, 58) pressing against a gasket (60) located in a groove to form a sealed gas manifold chamber.

US005890485 (SHIMEK et al) discloses spacers (22).

US004257757 (ASHE et al) shows an ceramic burner body where a spacer (60) presses against a gasket (62) located in a groove to form a sealed gas manifold chamber.

EP000521833(BERTAZZONI), EP000226324 (HERBERT) (see figures 5, 9, 10) and **US002194208 (MORAN)** all show radiant burners with spacers or fences.

US00697941 (HEWITT) shows a restricted passage (6) as well as a restrictions (a") through which gas flows from a first to a second recessed manifold portion.

US003181590 (DUPLER) shows a contoured surface (11).

USPTO CUSTOMER CONTACT INFORMATION

Any inquiry concerning this communication or earlier communications from the examiner should be directed to CARL D. PRICE whose telephone number is (571) 272-4880. The examiner can normally be reached on Monday through Friday between 6:30am-3:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Monica S. Carter can be reached on (571) 272-4475. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).



CARL D. PRICE
Primary Examiner
Art Unit 3749

cdp